

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
SAMUEL J. PASQUARELLA	:	DETERMINATION
D/B/A YORK CAR MART	:	
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1983	:	
through May 31, 1986.	:	

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Petitioner, Samuel J. Pasquarella d/b/a York Car Mart, 2085 South Park Avenue, Buffalo, New York 14220, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1983 through May 31, 1986 (File No. 806676).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York, on January 11, 1990 at 9:15 A.M., with all briefs to be submitted by March 26, 1990. Petitioner appeared by Peter S. Aiello, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether, as a result of an audit, the Division of Taxation properly determined additional tax due.

FINDINGS OF FACT

On February 9, 1987, following an audit, the Division of Taxation issued to petitioner, Samuel Pasquarella d/b/a York Car Mart, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed \$31,907.82 in tax due, plus penalty and interest, for the period June 1, 1983 through May 31, 1986.

Pursuant to a Conciliation Order, dated December 9, 1988, the assessment herein was

reduced to \$25,846.39 in tax, plus penalty and interest.

During the period at issue, petitioner, doing business as York Car Mart, sold used cars.

The Division's initial contact with petitioner consisted of a visit to petitioner's premises by the Division's auditor. The auditor was under instructions to observe the car lot to determine the number of cars thereon and their approximate value. If the number of cars was few and the estimated value thereof minimal, then the auditor was instructed to go no further with the audit. Upon this initial visit, the auditor observed few cars on the lot which he estimated to be of minimal value. In accordance with his instructions, the auditor determined not to proceed any further with the audit.

The auditor was subsequently directed by his supervisor to conduct an audit of petitioner's sales activity; in effect, to re-open petitioner's file. This decision was based upon a review of certain Department of Motor Vehicles Certificate of Sale forms (MV-50's) which indicated to Division personnel an underreporting of taxable sales by petitioner.

The auditor thus returned to petitioner's premises and was directed by petitioner to petitioner's accountant, who had been retained by petitioner during the interim between the auditor's initial and subsequent visits to petitioner's premises, and to whom petitioner had, during that interim, transferred all of his records. The auditor requested and was provided with petitioner's sales records with respect to the period covered by the MV-50's in the auditor's possession (June 1, 1984 through November 30, 1984).

The records so provided consisted of certain summary lists of sales by petitioner during 1984. These lists were prepared by petitioner and set forth the date of sale, a description of the vehicle sold, and the purchaser's name. It is unclear from the record when or why petitioner prepared the summary lists. The record is also unclear as to what sources were used by petitioner to construct the summary lists.

The auditor was also provided with petitioner's 1984 Federal income tax return. Upon review of petitioner's reported gross receipts, as listed on his schedule C, the auditor concluded that the summary sheets were used to prepare the schedule C. The auditor also concluded that

the summary lists were attached to and part of the schedule C.

On audit, petitioner's accountant also made available petitioner's bank statements and cancelled checks for the audit period. These records were not used by the auditor in performing the audit.

During the course of his contact with petitioner and petitioner's accountant, the auditor was advised that petitioner had incomplete invoices for the entire audit period. The auditor was also advised that petitioner maintained no general ledgers or day books at any time during the audit period.

Following his review of petitioner's sales records with respect to the period June 1, 1984 through November 30, 1984, the auditor detailed petitioner's sales for that period using the MV-50's. The MV-50 forms indicated 118 sales during this period. The MV-50's set forth thereon the date of the sale, the name and address of the purchaser and a description of the vehicle. Inasmuch as the purpose of the MV-50 is the proper registration of the vehicle, it does not list the selling price. In order to determine the selling price, the auditor reviewed petitioner's 1984 summary sheets and found the sale on the summary sheets corresponding to the particular MV-50. The auditor found a sale on the MV-50's corresponding to the summary sheets for 87 sales which totalled \$47,845.00.

The auditor determined that there were some 31 sales indicated by the MV-50's which were not listed on the summary sheets. With respect to all but two of these 31 sales, the auditor determined a selling price by comparison of the description of the vehicle sold as indicated on the MV-50 with a vehicle with a similar description listed in the summary sheets and assigning the price of the similarly described vehicle to the sale in question. For example, if an MV-50 indicated that a 1978 Buick was sold, but such sale was not listed on the summary sheets, the auditor reviewed the summary sheets to find another 1978 Buick and assigned the selling price of the 1978 Buick so listed to the 1978 Buick in question. On his initial audit, the auditor determined the selling price of 29 vehicles in this manner. Additionally, the auditor estimated the selling price of one vehicle by reference to the N.A.D.A. book. Estimated selling prices for

vehicles during the test period determined in this manner totalled \$20,998.00.

The auditor determined the selling price of one vehicle (\$350.00) by reference to an invoice. This was the only sales invoice for the test period made available to the auditor.

The auditor next determined the percentage of error in petitioner's taxable sales reported during the test period by dividing audited taxable sales during the test period determined as noted above (\$68,843.00) by taxable sales reported during the same period (\$9,945.00). The resulting percentage of error of 692.2% was applied to petitioner's reported taxable sales throughout the audit period (which totaled \$71,285.00) resulting in audited taxable sales of \$493,435.00 and, ultimately, the additional tax due assessed in the statutory notice.

During the course of the audit, petitioner's accountant advised the auditor that invoices were particularly lacking with respect to the chosen test period as a result of burglaries of petitioner's premises and requested that the auditor use another test period. The accountant suggested use of a period for which more invoices were available. The auditor was also in possession of MV-50's for the period September 1, 1985 through May 31, 1986, and detailed petitioner's sales for this period. The MV-50's indicated 196 sales during the nine-month period. The auditor next reviewed invoices which were available to determine the selling price of these vehicles. Invoices were available with respect to 72 of these sales. The auditor did not determine selling prices of the remaining vehicles sold during this second test period as he discontinued further use of this test period.

At hearing, petitioner argued that use of the period March 1, 1986 through May 31, 1986 as a test period would result in the most accurate determination of petitioner's taxable sales as more invoices were available for this period than for any other during the audit period. The MV-50's indicated 78 sales during this three-month period. Petitioner had invoices for 58 of these sales and the summary sales sheets provided selling price information with respect to 9 other sales.

Following the issuance of the notice of determination, and at the direction of the conciliation conferee, the auditor and petitioner's accountant entered into further discussions

regarding the assessment. Based upon certain additional evidence, the Division adjusted the audited taxable sales during the test period from \$68,843.00 to \$57,654.00. This reduction was primarily based upon a reduction in estimated car sales during the test period from \$20,998.00 to \$9,838.00. The reduced test period sales figure resulted in a reduced error percentage (579.7%) and, ultimately, in the reduced assessment set forth in the conciliation order (Finding of Fact "2").

Petitioner did not hire his accountant until the commencement of the audit herein. During the audit period, petitioner maintained his own books and records and prepared and filed his own sales and income tax returns.

#### CONCLUSIONS OF LAW

A. The Division's use of an indirect audit method is proper where, as here, a taxpayer does not have the records necessary to verify taxable sales (Matter of Licata v. Chu, 64 NY2d 873, 487 NYS2d 552). Under such circumstances, the Division has a duty to determine tax due from such information as may be available (Tax Law § 1138[a][1]). The Division is required to select an audit method reasonably calculated to reflect the tax due (Matter of Grant Co. v. Joseph, 2 NY2d 196, 206, 159 NYS2d 150, 157, cert denied 355 US 869). Where the Division selects such an audit method, a presumption of correctness attaches to the assessment (Matter of Cousins Service Station, Tax Appeals Tribunal, August 11, 1988) and petitioner bears the burden of proving error (Matter of Scarpulla v. State Tax Commn., 120 AD2d 842, 502 NYS2d 113).

B. In the instant matter, petitioner has failed to sustain his burden of proving error. Petitioner did not dispute the propriety of the Division's use of a test period methodology, but, rather, disagreed with the Division's use of the particular test period employed herein. Specifically, petitioner contended that the three-month period March 1, 1986 through May 31, 1986 would have provided a more accurate test period than the Division's June 1, 1984 through November 30, 1984 period. Petitioner's contention centers upon the availability of more invoices for this three-month period than were available for the test period employed herein.

Petitioner thus contended that audited sales for the three-month period would be more accurate than audited sales for the six-month period. Use of this three-month test period would, according to petitioner's calculations, result in a lower, though still substantial, tax liability. Petitioner's accountant estimated that the percentage of error using the proposed three-month test period would be about 300%.

Petitioner's contentions are rejected. First, it is unclear from the record that audited sales figures from petitioner's three-month period are significantly more accurate than audited sales for the six-month test period herein. Of the 78 total sales during petitioner's three-month period, selling prices for 58 of the sales were obtained from invoices and nine were obtained from petitioner's summary lists. Selling prices for 67 of 78 sales, or 85.9%, were thus obtained from petitioner's records. With respect to the six-month period used by the Division, of 118 total sales, 87 were determined from the summary lists and one from an invoice. 74.6% of these sales were thus determined from petitioner's records. While invoices are obviously preferable to summary lists, petitioner does not contend the selling prices on his summary lists are inaccurate, for in developing his percentage of error for his three-month test period, petitioner relied on the summaries also. Second, and most important, it is well established that exactness in the determination of sales tax liability is not required where it is petitioner's own failure to keep adequate books and records which causes any such inexactness (see, Matter of S.H.B. Supermarkets v. Chu, 135 AD2d 1048, 1050). Thus, the fact that a different test period might have given a better picture of petitioner's sales and his tax liability (and it should be noted that petitioner has shown no such test period herein) does not satisfy petitioner's burden to show that the amount of tax assessed was erroneous (see, Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, affd 44 NY2d 684).

C. The petition of Samuel J. Pasquarella d/b/a York Car Mart is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated February 9, 1987, as modified by the Conciliation Order, dated December 9, 1988, is sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE